20-3836

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

MAMADOU AMADOU SARR,

Petitioner,

– against –

MERRICK B. GARLAND, United States Attorney General,

Respondent.

ON PETITION FOR REVIEW FROM THE BOARD OF IMMIGRATION APPEALS

[PROPOSED] BRIEF OF *AMICI CURIAE* THE BRONX DEFENDERS, IMMIGRANT RIGHTS CLINIC OF WASHINGTON SQUARE LEGAL SERVICES, INC., THE LEGAL AID SOCIETY, MAKE THE ROAD NEW YORK, PRISONERS' LEGAL SERVICES OF NEW YORK, AND UNLOCAL, INC. IN SUPPORT OF PETITIONER'S MOTION TO AMEND

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STATEMENT OF INTEREST OF AMICI

Amici curiae are nonprofit legal services organizations that represent substantial numbers of noncitizens in removal proceedings before immigration judges and the Board of Immigration Appeals ("BIA") and on petitions for review in this Court and other courts of appeals. We respectfully submit this brief to assist the Court in understanding the process by which the Department of Homeland Security ("DHS") initiates removal proceedings and the unreliability of the information that appears on the case initiating document known as a Notice to Appear ("NTA").[1]

As we explain in detail below, in amici's experience, the case initiation process and documents are rife with error and confusion. DHS frequently omits time, date, and court location information from NTAs, or, as here, includes incorrect court location information. It is unsurprising to amici that the record in this very case, and in particular the inaccurate information on the NTA, has led to confusion about the fact that proceedings were commenced in Batavia, New York.

[1] In accordance with Federal Rule of Appellate Procedure 29(a)(4), amici certify that no amicus curiae is a corporation, no party's counsel authored any part of the brief, and no person or entity contributed money to prepare or file this brief other than amici. Individual statements of interest for each amicus curiae are provided at Appendix A.

Counsel for petitioner consents to, and the government takes no position on, the filing of this brief, which amici file with a motion for leave of the Court.

The Court should not rely upon the court location information contained in the NTA, or credit the hearing location noted on hearing notices, to establish the location in which proceedings were duly commenced.

In light of the information presented here, amici support Petitioner's request to amend this Court's decision to accurately reflect that proceedings were commenced at the immigration court in Batavia, New York, rather than Louisiana, and that venue is therefore proper in the Second Circuit. Amici also seek clarification of the Court's decision with regard to the effect of the forbearance policy when a motion for stay of removal has been denied.

ARGUMENT

A. Amici support Petitioner's request to amend the characterization of where his immigration proceedings commenced

(1) The information on NTAs is frequently incomplete or unreliable, and should not be used as a basis for determining where the document was filed to commence proceedings

As explained in Petitioner's motion to amend, the procedure for initiating removal proceedings has been established in the Immigration and Nationality Act and accompanying regulations. *See* Petitioner's Motion 2-5. DHS must first serve the NTA on the noncitizen respondent, 8 U.S.C. § 1229(a)(1), and then formally commence removal proceedings by filing the NTA in immigration court, 8 C.F.R. § 1003.14(a).

By statute, the NTA should specify, among other things, the time and place at which the proceedings will be held. § 1229(a)(1)(G)(i); 8 C.F.R. § 1003.18(b) (specifying notice of time, place and date of the initial removal hearing should be provided in the NTA where practicable, or else subsequently provided by written notice). Though this may seem straightforward, in amici's experience, the reality of this process does not match the procedures laid out by statute and regulation and is rife with error and confusion.

For example, DHS may take weeks or months to file an NTA with an immigration court, or may elect not to file the NTA at all despite having served it on a respondent. *See, e.g.*, Brief for the Petitioner at 7, *Sac-Guarchaj v. Garland*, No. 21-6288 (2d Cir. Dec. 13, 2021) (noting delay of 20 months and citing CAR 124, 140); *In Re: Olatunde Osinubi*, No. : AXXX-XX4-471 - DAL, 2018 WL 6618263, at *1 (BIA Oct. 8, 2018) (noting 11 month delay); *Vazquez Perez v. Decker*, No. 18-CV-10683 (AJN), 2019 WL 4784950, at *3 (S.D.N.Y. Sept. 30, 2019) (noting that the named plaintiff waited two weeks for his NTA to be filed with the immigration court). Recent data reveals that in thousands of cases, DHS has generated and served noncitizens with NTAs, but never taken the step of formally initiating removal proceedings by filing those notices with any immigration court, resulting in dismissal of cases for lack of jurisdiction. *See* Transactional Records Access Clearinghouse, Over 63,000 DHS Cases Thrown

Out of Immigration Court This Year Because No NTA Was Filed, Syracuse University (Oct. 17, 2022), https://trac.syr.edu/reports/699/.

As most relevant here, the NTA may omit entirely the time and date of the hearing as well as the hearing location, or contain a court location that does not accurately reflect the immigration court where it was later filed and proceedings commenced. *See, e.g.*, *United States v. Lopez-Macias*, No. ED CR 19-00147-FMO, 2020 WL 2946059, at *1 (C.D. Cal. June 2, 2020) ("The NTA ordered defendant to appear before an immigration judge ("IJ") at 146 CCA Road, Lumpkin, GA 31815 at midnight on January 15, 2016, approximately 18 days *before* defendant received the NTA. Additionally, the address listed on the NTA was different from the location of the immigration court at which defendant's hearing actually took place.") (citations omitted).

Prior to the Supreme Court's decision in *Pereira v. Sessions* in 2018, the overwhelming majority of NTAs did not specify a date or time of hearing or the location. 585 U.S. ——, 138 S. Ct. 2105 (2018). In *Pereira*, the Supreme Court held that an NTA that omits any of the statutorily required information like date and time of hearing is defective for certain purposes. *See id.* Though the Supreme Court's decision in *Pereira* is now more than four years old, amici routinely litigate cases at the agency and before this Court that involve NTAs that were generated before 2018. As this Court is no doubt aware, removal cases can last

years, even decades, and there is no shortage of cases that began pre-*Pereira* with flawed NTAs.

Even following the decision in *Pereira*, in amici's experience and as evidenced by further litigation on the adequacy of deficient NTAs to trigger immigration court jurisdiction, DHS has not resolved the problem. As the Supreme Court observed, "[p]erhaps the government could have responded to *Pereira* by issuing notices to appear with all the information § 1229(a)(1) requires" but in at least some cases, "it seems the government has chosen instead to continue down the same old path." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1479 (2021).

In amici's experience, DHS frequently specifies one location on an NTA, but later elects to file the charging document in a different immigration court. In one case, for example, DHS prepared an NTA directing two of our clients to appear at the Miami Immigration Court, but filed the NTA in New York. Certified Administrative Record at 785, 830, *Shente-Recinos v. Garland*, No. 21-6276 (2d Cir. June 2, 2021) (NTAs listing Miami as court but stamped as received in New York). In another case, the NTA directed a client to appear at immigration court at 26 Federal Plaza in New York City, but ICE filed the NTA at Varick Immigration Court. Certified Administrative Record at 164-68, *Sanon v. Sessions*, No. 18-225

(2d Cir. Feb. 8, 2018).[2] In other instances, ICE fails to specify *any* location on the NTA. *See, e.g.*, Certified Administrative Record at 547, *Zavala Almendades v. Garland*, 853 F. App'x 727 (2d Cir. 2020) (No. 18-3587) (NTA prepared in 2017 directing Mr. Zavala Almendades to appear at a location "[t]o be calendared and notice provided by the office of immigration court"); Certified Administrative Record at 625, *Benitez Marquez v. Garland*, No. 18-3460 (2d Cir. Dec. 11, 2018), (NTA prepared in 2016 directing Mr. Benitez Marquez to appear at a location "[t]o be calendared and notice provided by the office of immigration court"); Certified Administrative Record at 901, *Marquez v. Garland*, 13 F.4th 108 (2d Cir. 2021) (No. 18-3363) (NTA prepared in 2017 directing Mr. Marquez to appear at a location "[t]o be determined" at a time and date "to be set"). And in other instances, ICE may specify the correct location, but will decline to provide accurate information about the time and date of hearing. *See* Certified Administrative Record at 1099, *Maradiaga Ortiz v. Garland*, No. 21-6108 (2d Cir.

[2] It is not clear what process DHS uses when determining which location (if any) to put on the NTA. The Executive Office of Immigration Review's process for determining what "hearing location" to specify on its hearing notices is similarly opaque. Amici represent clients whose "hearing location" shifts from one hearing to the next, according to the hearing notices. *See, e.g.*, Certified Administrative Record at 734, 747, 748, 755, 757, 759, 761, 762, 764, 765, 773, 775, *Rodriguez Gonzalez v. Garland*, No. 21-6397 (2d Cir. July 30, 2021) (twelve hearing notices for case venued at Varick Immigration Court, eight of which list Varick Immigration Court in New York, four of which list Hudson County Jail in New Jersey).

Mar. 26, 2021) (NTA prepared in 2020 and directing the petitioner to appear at Varick Immigration Court at a date and time "to be set"); Certified Administrative Record at 776, *Rodriguez Gonzalez v. Garland*, No. 21-6397 (2d Cir. July 30, 2021) (same).[3] It therefore is not surprising to amici that DHS specified Jena, Louisiana (the location of the LaSalle Immigration Court) on the NTA, but then filed the NTA to commence proceedings in an unrelated immigration court in Batavia, New York.

(2) Basing venue on the location listed on the NTA would lead to arbitrary and unfair case outcomes

Basing venue on the hearing location that a DHS officer lists on a charging document—and not on the location where the charging document is actually filed—risks untethering the concept of venue from its practical purpose. And venue does serve a practical purpose, though proceedings are increasingly remote. Even if a detained respondent is appearing by videoconference, one venue may be more convenient than another because of proximity to nondetained witnesses, evidence and counsel. On Varick Immigration Court's detained docket, for example, counsel and nondetained witnesses, including family members, experts, and others, frequently attend court in-person, even if the detained respondent

[3] Several legal services organizations provided additional examples of DHS's longstanding practice of issuing NTAs that lack reliable hearing information in other cases. *See* Amicus Brief of Brooklyn Defender Services, et al., at 25-30, *Sac-Guarchaj v. Garland*, 21-6288 (2d Cir. Dec. 29, 2021).

appears only by video. *See, e.g.*, Petitioner's Reply in Support of a Stay of Removal and Opposition to Respondent's Motion to Dismiss/Transfer, at 4-5, *Maradiaga Ortiz v. Garland*, No. 21-6108 (2d Cir. Mar. 15, 2021) (explaining how Mr. Maradiaga Ortiz's counsel appeared at Varick in-person for the merits hearing). This Court has recognized that changes of venue may be necessary to facilitate the testimony of an important witness. *Monter v. Gonzales*, 430 F.3d 546, 559-60 (2d Cir. 2005).

Turning to Mr. Sarr's case, it makes little sense to conclude that his removal proceeding was "venued" at the LaSalle Immigration Court in Jena, Louisiana, simply because an ICE officer specified that court on the initial paperwork. It appears that no document in Mr. Sarr's case was ever filed at the LaSalle Immigration Court, none of the immigration judges at LaSalle ever reviewed Mr. Sarr's case, and neither Mr. Sarr nor anyone else involved in his case appeared at LaSalle by videoconference. As explained in detail in Petitioner's motion, the case was commenced in Batavia and the key events and documents associated with the case occurred in that location. *See* Petitioner's Motion 5-8.

Nor does it make sense to conclude that the case was "venued" at Richwood Detention Facility. If Richwood is similar to other immigration detention facilities, neither the NTA nor any other court document would have been filed with

administrative personnel at that facility, and no witnesses (beyond Mr. Sarr himself) or counsel would have been permitted to appear from that location.[4]

Allowing DHS to determine the venue simply by designating a "hearing location" that is separate from the court where immigration proceedings actually occur could lead to unjust and inefficient results. In the past, the potential for forum shopping when initiating removal proceedings was minimized by venue considerations. Although DHS could theoretically initiate proceedings in courts far away from a respondents' supporting witnesses, evidence, and counsel, a respondent could show good cause for a transfer. *See, e.g.*, *Monter*, 430 F.3d at 559-60. Uncoupling venue from the court location where counsel appear, record evidence is filed, and witnesses and observers attend proceedings, would enable DHS to alter its NTA practices to its advantage. The law governing issues of removability and relief varies by circuit, and DHS could manipulate the outcome of an individual's case simply by designating a hearing location that is most favorable to DHS.[5]

[4] Several amici have previously outlined additional considerations as to why venue does not lie at immigration detention facilities and jails. *See* Amicus Brief of American Immigration Lawyers Association, et al., *Araya Berhe v. Garland*, No. 21-6042 (2d Cir. March 3, 2021).

[5] The Board has long adhered to a policy of considering itself bound to apply the law of the circuit in which a case arises. *See Matter of K-S-*, 20 I & N. Dec. 715, 718 (BIA 1993).

By adopting a stable rule tied to the agency's own venue regulations, the Court's decision in this case both "hews . . . to the law as written" and respects "the participants' reasonable expectations as to where to seek review and what law applies." Opinion, at 15-16. Amici support Petitioner's request that the Court clarify the factual point as to where Mr. Sarr's NTA was filed and proceedings commenced to prevent confusion or distortion of this rule.

B. The Court's characterization of the forbearance policy is inconsistent with DHS's practices

Amici respectfully note that the Court's description of the forbearance policy—as applicable to Mr. Sarr to prevent removal *even following* the denial of his stay motion—is inconsistent with the government's interpretation of the agreement between DHS and this Court. Under that agreement, DHS forbears the removal of a petitioner seeking review in this Court while a stay motion is pending, but not if it has been denied. *See, e.g.*, *Efstathiadis v. Holder*, 752 F.3d 591, 599 n.5 (2d Cir. 2014) ("While a petition [for review] is pending in this Court, the Government's forbearance policy assures that the filing of a motion to stay removal, as has been done here, will suffice to prevent removal."); *Zheng v. Decker*, 618 F. App'x 26, 28 (2d Cir. 2015) ("In accordance with the Government's forbearance policy, [the petitioner] may not be removed while his stay motion is pending."); Brief for Respondents-Appellants at 2, *Doe v. Decker*,

No. 22-489 (2d Cir. June 21, 2022) (government brief explaining that "under [the forbearance policy] the government agrees to refrain from removing noncitizens with both a petition for review and a stay motion pending in this Court"); *Mendoza-Ventura v. Garland*, No. 19-4176, 2022 WL 1073010, at *1 (2d Cir. Apr. 11, 2022) (noting petitioner was removed after his stay was denied, two years prior to the Court's decision granting his PFR). In one case where a panel has intended for the forbearance policy to remain in place, it has declined to grant a formal stay and simply reminded the parties of the policy. Motion Order, *Baptiste v. Garland*, No. 19-2238 (2d Cir. July 9, 2020). Because the Court's characterization of the forbearance policy may lead to undue confusion among future litigants, amici request that the Court consider clarifying that portion of its decision.

CONCLUSION

For these reasons, amici curiae respectfully ask this Court to grant Petitioner's motion to amend.

Dated: November 21, 2022
New York, NY

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 27(d)(2)(A) and 29(a)(5) and Local Rule 29.1(c), because the brief contains 2597 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman.

Dated: November 21, 2022
New York, NY

/s/ Julie Dona
Julie Dona

APPENDIX A:
STATEMENTS OF INTEREST OF AMICI CURIAE

The Bronx Defenders is a nonprofit provider of innovative, holistic, and client-centered criminal defense, removal defense, family defense, social work support, and other civil legal services and advocacy to indigent Bronx residents. It represents individuals in over 20,000 cases each year and reaches hundreds more through outreach programs and community legal education. The Immigration Practice of The Bronx Defenders provides removal defense services to detained New Yorkers as part of the New York Immigrant Family Unity Project at the Varick Street Immigration Court and also represents nondetained immigrants in removal proceedings. The Bronx Defenders' representation extends to affirmative immigration applications, motions to reopen, appeals and motions before the BIA, petitions for review, and federal petitions for writs of habeas corpus challenging unlawful immigration detention.

The Immigrant Rights Clinic ("IRC") of Washington Square Legal Services, Inc., has a longstanding interest in advancing and defending the rights of immigrants. IRC has been counsel of record or counsel for *amici curiae* in several cases before this Court and others, challenging the legality and constitutionality of the government's detention authority and its failure to provide immigrants in detention with due process of law.

The Legal Aid Society is the nation's oldest and largest not-for-profit provider of legal services to low-income clients. Its Immigration Law Unit (the "ILU") is a recognized leader in the delivery of free, comprehensive and high-caliber legal services to low-income immigrants in New York City and surrounding counties. Part of the ILU's work consists of representing detained individuals in removal proceedings before immigration judges, on appeals to the BIA and the United States Court of Appeals for the Second Circuit, and in habeas proceedings in the Southern District of New York and the District of New Jersey.

Make the Road New York ("MRNY") is a nonprofit, membership-based community organization that integrates adult and youth education, legal and survival services, and community and civic engagement, in a holistic approach to help low-income New Yorkers improve their lives and neighborhoods. MRNY has over 200 staff, over 24,000 members, and five offices spread throughout New York City, Long Island, and Westchester. MRNY is at the forefront of numerous initiatives to analyze, develop, and improve civil and human rights for immigration communities, including issues related to detention and deportation of immigrant community members. Its attorneys and accredited representatives regularly represent both detained and nondetained clients in the greater New York City area in immigration matters.

Prisoners' Legal Services of New York ("PLS") is a nonprofit organization that has provided civil legal services for over forty-six years to indigent individuals incarcerated throughout New York State. As part of the New York Immigrant Family Unity Project, PLS provides free legal representation to noncitizens incarcerated in New York State prisons facing immigration removal proceedings under the Institutional Hearing Program, in addition to noncitizens held in immigration detention in Albany, Batavia, and Plattsburgh, New York. PLS also provides representation in habeas corpus proceedings to detained immigrants in the U.S. District Courts for the Southern and Western Districts of New York and on petitions for review and civil appeals before the U.S. Court of Appeals for the Second Circuit. PLS has a strong interest in protecting the due process rights of incarcerated and detained noncitizens and ensuring they receive proper access to counsel and mechanisms of judicial redress.

UnLocal, Inc. is an immigration legal services and community education non-profit based in New York City. UnLocal provides presentations on immigration law, know your rights trainings, and legal consultations at community-based spaces including schools, workplaces, placed of worship and other immigrant-serving organizations. UnLocal clients and the membership of many of UnLocal's community-based partners include individuals who have faced detention during the pendency of their removal proceedings.